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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

A. L. ADAMS CONSTRUCTION CO.

Petitioner

v.

GEORGIA POWER COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In an unprecedented two-step expansion of the nonstatutory labor exemption to the antitrust laws as well as an unprecedented extension of the scope of Section 8(f) of the National Labor Relations Act, the Eleventh Circuit radically departed from decisions of this Court by holding that a utility company, which conspired with a group of unions to exclude all nonunion contractors from a 7.2 billion dollar nuclear power project, was exempt from scrutiny under the federal antitrust laws. This decision was reached even though the exclusion was not contained within a standard collective bargaining agreement, and the utility company admitted that it was not primarily engaged in the construction industry, that it did no construction work at the project in question, did not bid for work, and was the project's owner.

The petition presents questions of paramount importance to this nation's construction industry. The Eleventh Circuit ruling ignores the distinctions between concerted activity which affects the labor market and

that which affects the commercial market, a distinction which has been at the cornerstone of this Court's decisions seeking to resolve the conflicts arising in the clash between the nation's antitrust and labor laws. Further, the Eleventh Circuit's decision would allow companies with no vested interest in the industry to combine with unions to exclude nonunion construction companies from the commercial market.

The precise questions presented for review are:

1. Shall the language of Section 8(f) of the National Labor Relations Act permitting "an employer engaged primarily in the building and construction industry" to enter into a pre-hire agreement be interpreted to allow an employer whose primary business is outside the building and construction industry - but supervises work on one construction site only - to qualify for 8(f) treatment, and thereby be exempt from the federal antitrust laws?

2. May a utility company, which passes its costs directly to consumers, escape scrutiny under the antitrust laws by taking advantage of Section 8(f) of the

National Labor Relations Act when it combines with a group of unions to exclude nonunion contractors from a $7.2 billion dollar construction project under circumstances where its agreement with the unions is not contained in a standard collective bargaining agreement, the utility company is not engaged primarily in the construction industry, did not bid for work at the project, did no construction work at the project, and satisfies none of the Congressional policies underlying the intent of Section 8(f)?

3. May a utility company conspire with a group of unions to exclude a nonunion company from a construction project, where the nonunion company agrees to comply with all the terms and conditions of the Project Agreement, where the utility company hires no craft employees from certain of the unions, and where the unions had no intent to organize the employees of the utility company?

PARTIES TO THIS PROCEEDING

The Petitioner in this case is A. L. Adams Construction Co., a nonunion general contractor. The Respondent is Georgia Power Company, an electric utility corporation.

Adams Construction Co. has no subsidiary or affiliated companies. It has three stockholders: A. L. Adams, J. Wayne Brewer, and J. H. Hyde.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Adams Construction Co. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 4, 1984.

I.

OPINIONS BELOW

The opinions filed by the United States Court of Appeals for the Eleventh Circuit are reported at 733 F.2d 853 (11th Cir. 1984), and appear in the Appendix hereto at p. 1a. The decision of the United States District Court for the Southern District of Georgia is reported at 557 F. Supp. 168 (1983), and appears in the Appendix at p. 19a. The Eleventh Circuit's Order of December 11, 1984, denying Petitioner's Petition for Rehearing appears in the Appendix at p. 53a.

II.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 4, 1984. A timely Suggestion For Rehearing En Banc and Petition for Rehearing was denied December 11, 1984. This Petition is timely filed with this Court under the provisions of 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).[1]

1/ Jurisdiction was vested in the District Court by virtue of 15 U.S.C. §§ 4 and 22.

III.

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. National Labor Relations Act, as amended by Labor Management Relations Act of 1947:

   § 8(e), 29 U.S.C. § 158(e)

   § 8(f), 29 U.S.C. § 158(f)

   § 9, 29 U.S.C. § 159

2. Sherman Antitrust Act:

   § 1, 15 U.S.C. § 1

3. 1933 Georgia Code:

   § 114-103, now codified at Georgia Code § 34-9-11.

Pertinent portions of these statutory provisions are reproduced in the Appendix at p. 55a.

IV.

STATEMENT OF THE CASE

A.

Preliminary Statement

By finding that a group of unions could lawfully persuade an owner to exclude nonunion contractors from

the 7.2 billion dollar Plant Vogtle construction project, the Eleventh Circuit radically extended the scope of Connell Construction, Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830 (1975) and decided a novel question[2] in a novel way by finding that under Section 8(f) of the National Labor Relations Act, a utility company was "engaged primarily in the construction industry" even though the company admitted its primary business was supplying electric power to the citizens of Georgia. The antitrust consequences of the lower court's decision are enormous. The 7.2 billion dollar cost of building Plant Vogtle (six times the original estimate) is passed on directly to consumers, who pay for Georgia Power's conspiracy with the unions in the form of higher electric bills. Moreover, competition will be lessened elsewhere - to the tune of billions of dollars in increased costs for construction

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2/ Georgia Power is entirely correct when it points out that "some of the issues to be addressed raise novel questions concerning the interpretation and interaction of the National Labor Relations Act and the Sherman Act." (Brief of Defendant-Appellee Georgia Power Company, Page V).

services - and the majority of our nation's construction companies (which are nonunion) may well be excluded from bidding on numerous construction projects.

B.

The Specific Facts

1. Georgia Power Company's Role At The Plant Vogtle Project.

Defendant Georgia Power Company ("Georgia Power") is a private electric utility corporation engaged in the business of selling electric power to virtually all of the citizens of the State of Georgia. (Mitchell Depo., p. 39). Selling electric power is Georgia Power's dominant, if not sole, source of revenue. (Mitchell Depo., p. 31; Johnston Depo., p. 83). The Court of Appeals found that Georgia Power is also the principal owner of the Alvin W. Vogtle Nuclear Project, ("Plant Vogtle") which is a generating plant being constructed in Burke County, Georgia. (Appendix, p. 2a.) The current estimated cost of the construction of Plant Vogtle is 7.2 billion dollars (originally estimated at approximately $1.2 billion). The Project consists of the erection of a

nuclear "power block" and several other "non-nuclear" structures.

The cost of Plant Vogtle is currently "the biggest issue in Georgia." (Appendix, p. 61a). The largest part of Plant Vogtle's cost will be passed on to consumers. (Appendix, p. 61a). Georgia Power is allowed to charge rates that will allow it to recover its operating costs and to earn a reasonable profit. (Appendix, p. 62a). According to the Atlanta Journal and Constitution, Plant Vogtle's costs "could send consumers scurrying for cover and could stymie efforts to attract new industry to the state for a long time." (Appendix, p. 61a). The cost of Plant Vogtle is one-tenth the value of all the goods and services Georgians produce in a year. (Appendix, p. 60a). Plant Vogtle threatens to create "economic chaos for consumers." (Appendix, p. 61a).

In its role as the principal owner of the Plant Vogtle Project, Georgia Power oversees the Project to insure that its investment is protected. (Wilson Depo., p. 56). It selected the general contractors to build the Plant, and periodically inspects their work. (Mitchell Depo., pp. 522-523).

The Plant Vogtle Project is massive and of unusually long duration. The Project is not expected to be completed in this decade. Work began on the Project in 1974, but was halted almost immediately. Although work was resumed late in 1976, the first concrete was not poured until August, 1978. Georgia Power had decided prior to March 31, 1978, that it would hire no craft employees at the Vogtle Project. (Mitchell Depo., Exhibit 14). The Court of Appeals found that Georgia Power currently hires no craft employees, and has not hired any since 1978. (Appendix, p. 3a). Consequently, Georgia Power, before the concrete was poured at Plant Vogtle and construction work was begun, had decided that it would hire no craft employees at Plant Vogtle for the remainder of the Project. The Court of Appeals found that at no time did Georgia Power hire any members of four of the thirteen unions which are parties to the Project Agreement. (Appendix, p. 3a).

At Plant Vogtle Georgia Power performs no construction work. (Cockrill Depo., p. 130). It has con-

tracted all major phases of the work to other contractors. It has never bid for work at Plant Vogtle, but rather accepts bids. (Mitchell Depo., p. 44). Its construction work at Plant Vogtle does not produce revenues for the company. (Gillespie Depo., p. 189). It is undisputed that Georgia Power's primary, if not sole source of revenue is selling electric power. (Gregory Depo., p. 55; Mitchell Depo., p. 31-32).

Georgia Power is a utility company. No witness from Georgia Power has denied that Georgia Power's primary business is to sell electricity to Georgia residents. (Dutton Depo., p. 231; Jones Depo., p. 10; Mitchell Depo., p. 31). Georgia Power does not even have a license to do contracting work, a necessary prerequisite for any contractor to do business in the State of Georgia. (Mitchell Depo., p. 43; Johnston Depo., p. 193). According to Georgia Power's Project Manager at the site, Georgia Power was not acting as a contractor at Plant Vogtle. (Gregory Depo., p. 59).

When it negotiated the Plant Vogtle Project

Agreement[3] with the signatory unions, Georgia Power was acting as the Project's owner. (Mitchell Depo., p. 111). No work had yet begun on the Project. (Appendix, p. 9a). Georgia Power does not dispute that it negotiated the Project Agreement without consulting any general contractors; in fact, Georgia Power had not yet even chosen its general contractors for the Project. (Mitchell Depo., pp. 109-110).

2. The Project Agreement.

The concept of a single Project Agreement for the Plant Vogtle Project was initiated by the Augusta area unions. (Mitchell Depo., p. 112). Work had been slow in the Augusta area, and work had been going to open shop contractors.[4] (Ehrensperger Depo., p. 100). Union representatives approached representatives of Georgia Power to discuss the possibility of entering into an

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3/ A Project Agreement is an agreement whose terms apply only to one particular project, as opposed to a standard agreement negotiated for all work to be done in a jurisdiction for a fixed period of time.

4/ The terms "open shop" and "nonunion" are interchangeable.

agreement restricting the Plant Vogtle Project to union contractors.[5] (Mitchell Depo., p. 113). The unions wanted to eliminate competition between union and nonunion contractors. (Johnston Depo., p. 291; Mitchell Depo., p. 118). Indeed, Georgia Power believed a Project Agreement "was the only way the Union Contractors had a chance of securing this work." (See Mitchell Depo., Exhibit 19).

5/ The deposition testimony and documents produced by Georgia Power demonstrate beyond question that the intent of the parties to the Project Agreement was to restrict the Plant Vogtle Project to union contractors. (Mitchell Depo., pp. 106, 144, 177, 178, 182, 246, 335, 520, 521, 601, 608; Ehrensperger Depo., pp. 44, 60, 71, 95, 100, 103, 124; Jones Depo., pp. 41, 60; Dutton Depo., pp. 43, 94; Wilson Depo., pp. 25, 26, 28, 43, 44; Johnston Depo., pp. 111, 112, 130; Gregory Depo., pp. 24, 26; Mitchell Deposition Exhibits 3, 22, 44; Adams Deposition Exhibit 20; Wilson Deposition Exhibit 1). It was privately understood by the parties to the Project Agreement that although the Agreement itself did not specifically restrict the Project to union contractors, the Project would nevertheless be operated as if it did. (Mitchell Depo., p. 144). Mr. Mitchell told Al Adams, the President of Adams Co., that the unions and Georgia Power had a "deal" to keep the Project restricted to union contractors, although no such restriction was part of the Project Agreement. (Brantley Depo., p. 15). The Project Agreement was implemented by an understanding between the parties that no nonunion contractors would be allowed to work on the Project. (Mitchell Depo., p. 144; Ehrensperger Depo., p. 60). Mr. Johnston testified that: "[I]t was our intent as the owner, once we executed this project agreement,

Without a Project Agreement, union contractors could not have successfully competed with nonunion contractors. (Mitchell Depo., p. 129). The effect of the Project Agreement was to artificially put the union contractors "in a better competitive position than they would have otherwise been vis-a-vis open shop contractors." (Mitchell Depo., p. 48). Without the Project Agreement, "the union contractors would not be in a competitive bidding position with open shop contractors." (Mitchell Depo., p. 57). To put it more graphically, Georgia Power believed that without the exclusion of nonunion contractors from the Project, "the union contractors didn't stand a snowball's chance in hell. It's pure economics." (Mitchell Deposition Exhibit 4, at p. 48). Furthermore, without the Project Agreement, Georgia Power might have used both union and

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that we would invite union contractors to bid on the various parts of the job and to furnish the union craftsmen required to build the project." (Johnston Depo., p. 56). (Emphasis supplied). The "all-union labor" requirement in the Project Agreement was enforced by the parties as if it read "all union contractors." (Mitchell Depo., p. 601).

nonunion contractors at the Plant Vogtle Project. (Mitchell Depo., pp. 520-521).

According to Mr. Mitchell, the chief negotiator of the Project Agreement and a Georgia Power employee for 43 years, Georgia Power was not in a bargaining relationship with the unions signatory to the Project Agreement. (Mitchell Depo., pp. 587-588). Nor was the Project Agreement a labor agreement. (Mitchell Depo., pp. 587-588; Mitchell Depo., pp. 495-497; Mitchell Depo., p. 599). This view was shared by Georgia Power's Project Manager at Plant Vogtle. (Gregory Depo., pp. 88-90). There were no negotiations between the parties as to wages; wages were to be negotiated by local contractors (over whom Georgia Power had no control) with the union. (Mitchell Depo., p. 599). In other words, local contractors not necessarily associated with the Plant Vogtle Project would do the bargaining with the signatory unions on an annual basis to determine the wage scales of craft employees at the Plant Vogtle Project. (Ehrensperger Depo., pp. 33-34).

3. The Exclusion of Adams Construction Co.

On March 24, 1980, Adams Construction Co. ("Adams") received a letter from Georgia Power inviting it to submit a bid for the construction of the Administration Building. Adams subsequently submitted a bid, and on July 28, 1980, Adams was evaluated to be the low bidder. (Mitchell Depo., p. 336). Georgia Power admits that Adams was qualified to perform the work (Johnston Depo., p. 231); that Georgia Power excluded Adams from the project because it would not become a union contractor (Mitchell Depo., p. 246); and that Adams was willing to comply with all of the terms and conditions of the Project Agreement, including hiring union employees and paying union rates. The Court of Appeals found that Adams was excluded because it was a nonunion contractor. (Appendix, p. 4a). There was no finding that Adams refused to comply with any of the terms and conditions of the Project Agreement. Adams was willing and ready to hire union subcontractors and union employees, pay union wages, pay union fringe benefits, and obey union work rules. Indeed, it was on this basis that Adams submitted its low bid on the Administration Building.

C.

The Opinion Below

The Court of Appeals held that Georgia Power and the unions were unable to enter into a standard collective bargaining agreement within the meaning of 29 U.S.C. § 159 because the Augusta Building and Trades Council did not qualify as the elected bargaining representative of Georgia Power's employees. (Appendix, p. 9a). The Council did not qualify because at the time of the agreement, no work had begun on the project and no workers had been hired. (Appendix, p. 9a). Thus, the parties could escape antitrust scrutiny only if the agreement qualified as a valid prehire agreement under § 8(f). That could occur, however, only if Georgia Power was an employer "engaged primarily in the building and construction industry."

The Court of Appeals conceded - "Admittedly, the major portion of Georgia Power's business involves the production and sale of electricity", (Appendix, p. 10a) - but nevertheless found that Georgia Power could still seek the protection of § 8(f) on the theory that an

employer - even if largely involved in nonconstruction industries - may take advantage of § 8(f) if it is "sufficiently engaged in construction work at one site." (Appendix, p. 10a). This construction of §8(f) is, however, contrary to the plain language of the statute.

The Court of Appeals reached this conclusion citing no federal case authority and no legislative history in support of its ruling. Not only is the lower court's decision plainly in error, it creates a potentially dangerous and disruptive new situation in the construction industry. Owners who are largely outside the industry may now come into the industry on one project, cause sweeping changes, and leave the industry in a state of disarray, having no further contact with or interest in the industry. Moreover, nonunion contractors - which comprise the majority of this nation's contractors - can now be excluded from a substantial share of the construction market, and unions can now pressure owners directly to exclude all competitors of union companies. The result will be higher, less competitive prices for goods and services in the construction industry.

Most importantly, the Eleventh Circuit, in focusing on the narrow issue of whether an employer may qualify for 8(f) treatment when it in fact is not primarily engaged in the construction industry, missed the larger issue, and blurred the crucial distinction between activity in the commercial market and activity in the labor market. This error, too, has significant legal as well as practical consequences.

V.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. THIS CASE PRESENTS A SIGNIFICANT QUESTION OF FIRST IMPRESSION WHICH SHOULD BE CONSIDERED BY THIS COURT: WHETHER AN ELECTRIC UTILITY COMPANY WHICH COMBINES WITH UNIONS TO EXCLUDE NONUNION CONTRACTORS FROM BILLIONS OF DOLLARS OF CONSTRUCTION WORK IN THE COMMERCIAL MARKET MAY ESCAPE THE SCRUTINY OF THE ANTITRUST LAWS BY TAKING ADVANTAGE OF SECTION 8(f) OF THE NATIONAL LABOR RELATIONS ACT WHEN SAID COMPANY

IS NOT ENGAGED PRIMARILY IN THE CONSTRUCTION INDUSTRY, DOES NO CONSTRUCTION WORK, DOES NOT BID FOR WORK, AND SATISFIES NONE OF THE CONGRESSIONAL POLICIES UNDERLYING THE INTENT OF THE STATUTE.

Section 8(f) of the NLRA - the governing statute in this case - requires an employer to be "engaged primarily in the construction industry" before being permitted to enter into a valid prehire agreement with a union. By finding that this language merely means "sufficiently engaged in construction work at one site," the Court of Appeals has plainly misinterpreted the meaning of the statute, and urges a construction of the statute which is unsupported either by the explicit terminology of the statute or by its legislative history. Section 8(f) does not even remotely validate a prehire agreement by an employer engaged in the construction industry at only one construction site. Nothing in the legislative history of § 8(f) indicates that Congress intended construction work at one site to be sufficient

to justify a prehire agreement. The Court of Appeals found that the primary business of Georgia Power is to sell electricity, not engage in construction. Georgia Power does not dispute this finding. (Ehrensperger Depo., p. 21; Jones Depo., p. 10).

Congress carefully drafted the language of this statute - even to the extent of making certain to add the word "primarily" to Section 8(f) and not Section 8(e) - but the Court of Appeals' decision entirely ignores and fails to address the Congressional intent in enacting Section 8(f). Section 8(f) was intended to address situations where contractors needed to know their labor costs immediately, and have employees ready to work. Thus, Congress passed Section 8(f) for two major reasons, neither of which is applicable to Georgia Power's situation at Plant Vogtle. First, a building contractor preparing a bid for a construction project has to know what his labor costs will be before he can make the necessary estimates upon which his bid will be based, and many construction projects are of such short duration that they would be completed long

before a collective bargaining agreement could even be negotiated and signed; and second, employers in the construction industry need an available supply of skilled craftsmen ready for immediate referral. See S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959), 1959 U. S. Code Cong. & Ad. News 2318, 2344, reprinted in I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 423 (1959).

However, neither of these reasons for enactment of 8(f) are applicable to Georgia Power's actions at Plant Vogtle. Since Georgia Power was not the contractor bidding to an owner for construction of any of the structures at Plant Vogtle, it did not have the need for a labor agreement to estimate its costs of construction as does the typical building contractor which Congress had in mind in enacting § 8(f). In addition, the Plant Vogtle Project was not anticipated to be - and in fact has not been - a project of such short duration that it would not be completed long before a collective bargaining agreement could be negotiated and signed. To the contrary, the Plant

Vogtle Project has gone on for eleven years and may not be completed in this century. Moreover, Georgia Power did not need to assure a ready source of skilled craftsmen available to Georgia Power on the work site. Rather, at most, Georgia Power was acting as a surrogate for its contractors in seeking to assure a ready supply of skilled craftsmen.[6]

In addition, the legislative history of Section 8(f) stresses the transitory nature of employment in the construction industry and concludes that prehire agreements are necessary because it is impossible to have representation elections to determine a union's majority status due to the short periods of an employee's actual

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6/ Nor are the purposes of § 8(e) met by an agreement between Georgia Power and the unions to use all union contractors. Section 8(e) is a work preservation tool for the unions to prevent a union contractor from avoiding his contractual obligations to the union by subcontracting to a nonunion contractor. In the instant case, however, Georgia Power is not a union contractor and never anticipated or intended to perform all or substantially all the work on the Plant with its own forces. Thus, granting 8(e) protection to this agreement is not preserving work to which the union is already contractually entitled by reason of an agreement between Georgia Power as a contractor and the union; rather, it is enforcing a bald exclusion of nonunion contractors from the initial opportunity to compete for the work for which the unions have no enforceable claim.

employment. The Senate Report describes the nature of the employment relationship in the construction industry as follows:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.

S. Rep. No. 187, 86th Cong., 1 Sess. 27 (1959), 1959 U. S. Code Cong. & Ad. News 2318, 2344 reprinted in I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 423 (1959).

The rationale behind allowing construction employers to enter into prehire agreements based on the temporary nature of construction employment is not served in the instant case. As noted above, a construction employee typically works for many different employers for short periods. This fact led Congress to conclude that representation elections are not feasible. These circumstances, however, are not found in the construction of nuclear power plants. The

Congressional purpose which took into account the impracticability of entering into new agreements on each construction site for both employers and employees will not be served when the construction project at issue is a nuclear power plant whose employees will be on the site for many years and when the construction employers and employees have plenty of time to negotiate new agreements.

In allowing Georgia Power Company to take advantage of the 8(f) exemption, the Court of Appeals did not support its reasoning with a single federal case. No federal court has allowed an owner of any sort to qualify as an employer "engaged primarily in the building and construction industry." Only contractors have received the exemption. Although the lower court's decision concedes that the "major portion of Georgia Power's business" is outside the construction industry (Appendix, p. 10a) it relies solely on a few NLRB cases to argue that Georgia Power may take advantage of 8(f) "if it is sufficiently engaged in construction work at one site." (Appendix, p. 10a).

Adams contends that the Court of Appeals seriously erred here for two reasons: First, there is not a shred of legislative history which suggests that Congress intended that a business could qualify for 8(f) treatment simply by being engaged "sufficiently" in the building and construction industry "at one site." Nowhere in the language of the statute is that expressed or implied. Second, even if this were true, Georgia Power in no way was or is engaged in construction work at Plant Vogtle. Georgia Power has itself stated that it has "no interest in the construction business." (Georgia Power Company's Brief In Support Of Its Motion for Summary Judgment, at p. 77).

The NLRA's legislative history clearly contemplates that sections 8(e) and 8(f) were intended to be applied solely to the construction industry, not to employers in the electric utility industry. Senator Kennedy in his remarks to the Senate Conference Committee referred explicitly to "contractors," thereby indicating that the provisions were not intended to be applied to owners who are merely purchasers of con-

struction services. Specifically discussing the construction industry proviso to Section 8(e), Senator Kennedy stated:

> [a]greements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e) . . . .

105 Cong. Rec. 17900 (1959); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1433 (1959). (Emphasis added).

Moreover, it is important to note that Sections 8(f) and 8(e) were intended to preserve the pattern of collective bargaining in the construction industry as it existed prior to their enactment. No evidence exists in the record or in the legislative history of § 8(f) which suggests that utility companies were entering into restrictive subcontracting agreements with unions prior to the enactment of this legislation. In Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 102 S. Ct. 2071 (1982), this Court stressed that Congress wished "to preserve the status quo" in the construction industry

when it enacted § 8(e). 456 U.S. at 657, 102 S. Ct. at 2078. Congress did not intend to create a situation whereby any corporation wishing to build a structure could, by virtue of its status as an owner, take advantage of Sections 8(e) and 8(f). This is particularly true of Section 8(f). Otherwise, Congress would not have explicitly referred to an "employer in the construction industry" in § 8(e) and an "employer engaged primarily in the construction industry" in § 8(f).

Indeed, Georgia Power meets none of the criteria commonly associated with employers engaged primarily in the construction industry, either generally or at Plant Vogtle:

1) It does none of the actual construction work with its own employees. (Cockrill Depo., p. 119).

2) It does not hire union craft employees. (Mitchell Depo., pp. 98-99).

3) The 150 workers it hired represented .02% of the workers employed, and these workers were hired before construction work was begun and the concrete was poured.

4) It contracts all of the work to general and specialty contractors. (Cockrill Depo., p. 119).

5) It does not bid for work. (Wilson Depo., p. 56).

6) It does no "construction work" for any entity other than itself.

7) It has no license to do construction work. (Mitchell Depo., p. 43; Johnston Depo., p. 193).

8) It derives no revenues from its "construction department." (Mitchell Depo., p. 32).

9) It does not even "coordinate" the work of its "subcontractors" (who are in reality the general contractors). (Johnston Depo., pp. 319-320). For example, once the job was let on the Administration building, Mobley, the general contractor, had the duty to coordinate its subcontractors. Even the day to day "administration" of the job was handled not by Georgia Power but by Southern Company Services. (Mitchell Depo., p. 209).

10) According to Georgia Power's project man-

ager at Plant Vogtle, Georgia Power does not act as a general contractor at Plant Vogtle. (Gregory Depo., p. 59).

Even assuming, arguendo, that under § 8(f), an employer performing construction work at one site can be considered an employer engaged primarily in the construction industry, Georgia Power was not acting in such a capacity at the Plant Vogtle Project site. (Gregory Depo., p. 59).

Since 1978, Georgia Power has hired no craft employees at the Plant Vogtle Project. (Even before 1978, Georgia Power hired at most 150 of approximately 9,000 craft employees then on the site). (Appendix, p. 3a). Georgia Power has contracted out all major phases of the work to general contractors, and does no actual construction work itself. (Cockrill Depo., p. 119). Its work at Plant Vogtle generates no revenues for the company, (Mitchell Depo., p. 32), and, by its own admission, it has "no interest in the construction business" (Georgia Power Company's Brief In Support Of Its Motion For Summary Judgment, at p.

77) and engages in "construction" only as a part of its business as an electric utility. (Affidavit of Richard E. Conway contained in Defendant Georgia Power Company's Motion For Summary Judgment). Indeed, the general contractors hired by Georgia Power were to have firm control over their individual contracts and were to have the "direct interface" with the union employees, including all labor relations with the unions; Georgia Power's sole role was to "monitor" these relationships. (Johnston Depo., p. 319). Simply because Georgia Power has chosen to label itself the "general contractor" at Plant Vogtle does not make it so; the truth is, Georgia Power contracted out all the work at the Plant to a group of general contractors. (Johnston Depo., p. 319). Adams, who was to do the work at the Administration Building, bid the job as a general contractor and obtained prices from subcontractors.[7]

7/ The contract between Mobley Construction Company (the union contractor which was awarded the job after Georgia Power excluded Adams) and Georgia Power refers to Mobley as the "Contractor" and Georgia Power as the "Purchaser." (Contract For Construction Of Administration Building For Plant Vogtle Of Georgia Power Company, Plaintiff's Exhibit 38).

In stark contrast, the employers in Connell, supra, and Woelke & Romero Framing, supra, were true general contractors. This Court, in describing Connell Construction Co. as a general contractor, stated: "It obtains jobs by competitive bidding and subcontracts all plumbing and mechanical work." 421 U.S. at 619, 95 S. Ct. at 1833. (Emphasis supplied). Georgia Power contracts out all of its work, and does not bid for work.

Georgia Power should not be permitted to evade the federal antitrust laws simply because it now chooses to call itself a general contractor. The mere fact that Georgia Power was in some instances monitoring the work of general contractors it hired to do work at Plant Vogtle - and it did hire general contractors who in turn hired subcontractors - does not magically transform Georgia Power into a general contractor. In the construction industry, an owner commonly oversees the work of one or more general contractors it has hired. For example, every one of the fifty states has departments of transportation which oversee and coordinate the work of multiple general contractors they hire to

build their roads, but by no means do these government agencies consider themselves "general contractors." They are owners protecting their investments, and coordinating the overall progress of the job.

The Court of Appeals cites no case authority for its conclusion that an employer who does no construction work can still qualify for 8(f) treatment. The only authority relied upon by the lower court is a letter contained in footnote 11 (Appendix, p. 18a) which has not been authenticated by Georgia Power and is, in any event, merely an opinion expressed by one Regional Director of the NLRB.

The Court of Appeals contends that if Adams prevails, contractors who subcontract all the work and perform no construction work on a project may not take advantage of the 8(f) exemption even if they are engaged primarily in the building and construction industry. What the lower court fails to see, however, is that such a result would be perfectly consistent with the underlying purposes of § 8(f). A contractor who performed no actual construction work on a project

would have no need to take advantage of § 8(f) because it would not need to prepare a bid based upon labor costs of union employees nor would it need to obtain a ready supply of skilled craftsmen. Such a contractor would not be hiring union craft labor. Section 8(f) would have no application to this situation. Indeed, this is the very reason the contractor in Connell, supra, was deemed to have no collective bargaining relationship with the union involved; the contractor had no employees from that union to do the work, but merely subcontracted out the work. For the same reason, the Court of Appeals' contention that Georgia Power should not be "penalized" for acting as its own general contractor because if it hired a general contractor, the contractor would meet the requirements of § 8(f), also misses the point. If the contractor did no construction work on the Project - that is, if it did what Georgia Power did at Plant Vogtle - it would not meet the requirements of § 8(f). Further, the Court of Appeals may well be in error when it takes the view that if Adams prevails, a legitimate contractor could not

subcontract out all of the work on a project and still qualify for the § 8(f) exemption: Under the statute, an employer "engaged primarily" in the industry can qualify for 8(f) treatment.[8]

In finding that Georgia Power Company was an employer engaged primarily in the construction industry because of its activities at Plant Vogtle, the District Court relied primarily on Zidell Exploration, Inc., 175 NLRB 887 (1969), while distinguishing Frick Company,

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8/ The District Court reasoned that the union looked to Georgia Power as the only employer with authority to execute a comprehensive prehire agreement, and that the unions would be put at a disadvantage if Georgia Power were not considered an employer in the construction industry. (Appendix, p. 42a). Such reasoning is "boot-strapping" at best. Whether the unions would be at a "disadvantage" is irrelevant; moreover, the unions could, as they had before and since 1974, negotiate directly with the contractors employing their members. The only "advantage" to negotiating directly with Georgia Power is that only Georgia Power could make a binding agreement to exclude from the project any contractors who had no collective bargaining agreements with the unions. It was this very type of "top down" organizing technique, through the vehicle of a "stranger" who employed no union craft labor, which was condemned in Connell. It is no more proper to permit the Augusta Building Trades the "advantage" of dealing with Georgia Power in order to secure work for their members on Plant Vogtle, than it would have been to allow the same "advantage" to the Plumbers and Pipefitters local union in Connell.

141 NLRB 1204 (1962). (Appendix pp. 40-42a).[9] In Zidell, a shipbuilder who also did much construction work entered into a contract with the United States Depart ment of Defense to dismantle a ballistic missile complex. In turn, Zidell contracted the actual dismantling work to Taylor. Taylor, the contractor,

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9/ In Frick, supra, the Board addressed the issue of whether the operations of the employer in question on a single site could be considered for the purposes of the applicability of § 8(f). The Board rejected the argument that "the applicability of § 8(f) should not depend upon an appraisal of the employer's entire operations but only of the particular contract in issue, which in this case was a contract for the performance of work exclusively related to construction." 141 NLRB at 1208. In Zidell, unlike Frick, a substantial part of Zidell's business, in addition to the contract in question, was in construction. Furthermore, Zidell, supra, cites with approval the case of Frick Co., supra, which held that an employer who derived a small percentage of its revenue from the installation of its products was not an employer primarily engaged in the building and construction industry. Georgia Power Company derives none of its revenue from the construction of Plant Vogtle.

Further, in Carpet, Linoleum and Soft Tile Local Union No. 1247, 156 NLRB 951 (1966), the NLRB specifically reaffirmed as a valid test in appropriate cases the proportion of the firm's gross revenue regularly derived from "contract construction" as a measure for determining whether an employer was primarily engaged in construction. Id. at 960; See also, Tulsa Sheet Metal Works, Inc., 149 NLRB 1487 (1964), enforced, 367 F.2d 55 (10th Cir. 1966).

entered into a prehire agreement with the Union governing Taylor's work. Then, when the contract with Taylor was subsequently terminated, Zidell undertook to complete the project itself. Subsequently, Zidell and the Union executed a formal bargaining agreement identical to the one between Taylor and the Union. Zidell began its "own hiring of employees for the project about mid April and carried it on until completion." 175 NLRB at 887. As these facts reveal, after Taylor's performance was terminated, Zidell operated as the construction contractor, and did the actual construction work. Zidell was apparently constructing structures under contract to others, rather than structures being built for itself, as in the case with all of Georgia Power's construction. The purpose of prehire agreements - to allow contractors to have control of their labor costs in formulating their bids for construction work - strongly suggests that the type of construction work to which Congress intended to give the benefits of prehire agreements was construction work under contract to others, not in-house construction

work.

Employees of an employer must do actual construction work for the employer to be considered "in the construction industry." Local 91, United Association of Plumbers and Pipefitters v. Kimberly-Clark Corp., 93 LRRM 2701 (N.D. Ala. 1976).[10] The Fifth Circuit has held that "Congress did not intend to include in the exemption those employers who manufacture and assemble products which are subsequently installed by others at the construction site." NLRB v. W. L. Rives Co., 328 F.2d 464, 469 (5th Cir. 1964). See also Animated Displays Co., 127 NLRB 999, 1022 (1962), enforced, 327 F.2d 230 (6th Cir. 1964) (where the Board distinguished between construction work and management of work). Thus, an employer must actually

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10/ The NLRB defines the term "contractors" to mean businesses "primarily engaged in the construction of dwellings, offices, buildings, stores, farm buildings, and other projects of a similar character." Carpet, Linoleum and Soft Tile Local Union 1247, 156 NLRB 951, 958 (1966) (emphasis supplied). Georgia Power Company, by its own admission, does no actual construction work, but at most "monitors" construction work.

perform construction work rather than just manage it in order to qualify for the exemption. See also, Forest City/Dillon-Tecon Pacific, 209 NLRB 141 (1974), remanded in part and enforced in part, 522 F.2d 1107 (9th Cir. 1975) (company engaged in manufacturing precast concrete not within exemption). In Frick, supra, its employees actually performed the installation work in question, whereas Georgia Power freely admits that its primary function was in project management, and related activities, (Georgia Power Company's Brief In Support Of Its Motion For Summary Judgment, at p. 35), none of which involved actual "hands on" construction work by employees on Georgia Power's payroll.

Moreover, the unions in the instant case had no interest in representing Georgia Power employees and made no attempt to organize them. Thus, the recognitional objective which this Court found lacking in Connell, supra, and which the Second Circuit Court of Appeals relied upon in Donald Schriver, Inc. v. NLRB, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981), is missing in the case at bar.

Adams submits that the 150 workers hired by Georgia Power Company did not engage in construction work, and the lower court's opinion erroneously states that "presumably" (Appendix, p. 13a) these workers were engaged in construction work. This is a critical error in the factual underpinning of the lower court's legal conclusion that Georgia Power acted as a "contractor" at the construction site.[11]

11/ The Court of Appeals cites, in footnote 3, Luke v. Owsley and Sons, Inc., No. CV 181-129 (S.D. Ga. Sept. 27, 1982), to support the contention that Georgia Power, due to its "pervasive control" at Plant Vogtle, is an employer in the construction industry at that site. However, Judge Bowen's decision in the Luke case arose in the context of an issue under the workers' compensation law. Judge Bowen held that since Georgia Power furnished workers' compensation insurance for contractors on the Plant Vogtle site, along with tools, materials, vehicles, and other items, and since Georgia Power exercised a large degree of supervisory authority over all the work, the contractors and their employees should be considered "employees" of Georgia Power, and therefore, "fellow employees" for purposes of old Georgia Code § 114-103 (1933). The issue of whether or not Georgia Power is an "employer" in the instant case for purposes of § 8(e) and § 8(f) of the National Labor Relations Act, which involves entirely different policy considerations, is different from the issue decided in the Luke case. Further, it is also clear that the evidence before the court in the Luke case was significantly different from the evidence before the lower court in the instant case. For instance, whereas all tools and materials were furnished to the con-

The errors made by the Court of Appeals are significant. First, it misapplied the meaning of Section 8(f), and radically extended its scope from employers "engaged primarily in the building and construction industry" to employers who are "sufficiently engaged in construction work at one site." (Appendix, p. 10a). (Emphasis supplied). Second, it affirmed the District Court decision on summary judgment that Georgia Power was engaged in construction work at Plant Vogtle, when the evidence plainly showed that Georgia Power was not. Third, by its misapplication of Section 8(f), the Court of Appeals dangerously expanded the scope of the labor exemption of the antitrust laws, and blurred the all-important distinction between the labor and commercial markets.

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tractors who were held to be "employees" of Georgia Power in the Luke case, such is not the case concerning the Administration Building contract which Adams was prevented from performing in the instant case. (Johnston Depo., p. 370; Mitchell Deposition Exhibit 23, at p. ID-2).

B. THE COURT OF APPEALS' UNPRECEDENTED EXPANSION OF THE NONSTATUTORY LABOR EXEMPTION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND BLURS THIS COURT'S CAREFULLY ESTABLISHED BOUNDARY BETWEEN THE COMMERCIAL AND LABOR MARKETS.

In affirming the grant of summary judgment to Georgia Power on the ground that its actions were exempt from the federal antitrust laws, the Court of Appeals' decision extended the labor exemption by two giant steps beyond existing federal case law. The consequences flowing from this double extension are of major significance.

The first step was in extending the exemption from building contractors who perform construction work to owners of construction projects. In this first step hangs the delicate balance of the antitrust and labor laws developed over the last half-century. It is here where the lower court ignored the crucial distinction between the commercial and labor markets, and the distinction between work acquisition and work

preservation.

When union representatives approached Georgia Power Company - the principal owner of Plant Vogtle - and sought to persuade it to exclude nonunion contractors from Vogtle, the issue was not work preservation; it was work acquisition. These unions had no prior collective bargaining relationship with Georgia Power. Nor were they seeking to organize Georgia Power's workers. (In this way, Georgia Power was a "stranger" company, precisely like the contractor in Connell.) The union representatives were, admittedly, seeking to influence a decision in the commercial market. There was, at that point, no work to preserve. No contractors had yet been hired. The unions had crossed into new and foreign territory, seeking to persuade Georgia Power as to which businesses it should use. The unions' admitted objective in this instance was to eliminate competition not in the labor market but in the business market.[12] This is the crucial difference

12/ The unions could have waited until Georgia Power Company selected its contractors and then negotiated with the contractors - thereby affecting competition in

between this case and all existing precedent. The lower court's decision fails to address what every labor exemption case comes finally to decide: Are the unions' activities designed to affect the labor market, and therefore protected by the labor exemption, or are they designed to affect the commercial market, and therefore within the exclusive province of the antitrust laws? In this case, the answer is clear.

Not only has the lower court expanded the exemption - which, like all exemptions, should be narrowly construed[13] - from contractors to owners, but in one swoop has extended it from private owners to

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the labor market - but fearing the contractors might be nonunion, the unions sought to influence Georgia Power Company's commercial decisions. The proper way for a union to get work for its members is to organize contractors, not influence market decisions.

13/ The labor exemption, as is true with all exemptions from the antitrust laws, is a narrowly construed, limited exception to the fundamental rule that competition shall remain free so that consumers can obtain the lowest possible prices for goods and services. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231, 99 S. Ct. 1067, 1083 (1979).

electric utility companies. A utility company is fundamentally different from a private owner in two respects relevant to the antitrust laws: first, it has far less incentive than a private owner to compete and charge the lowest possible price; and second, the increased costs of Georgia Power are passed directly to the public in the form of rate hikes. The public pays for Georgia Power's restraints on competition, not Georgia Power.

No utility company has ever been found to be exempt from the antitrust laws by reason of the labor exemption. Only contractors - whose costs are not passed on to the public - have received the exemption. No contractor can afford to substantially increase its costs. Georgia Power Company can, since it does not truly pay for the increase. The reason: Georgia Power Company is not truly an employer in the construction industry, as that term is commonly understood.

The applicability of the non-statutory exemption requires an examination of whether the questioned combination or agreement affects the labor market or

the commercial market. This demarcation is necessary to reconcile the inherent tension between the antitrust laws and labor laws.[14] The National Labor Relations Act reflects the federal economic policy choice that restraints upon competition on the core union issues of "rates of pay, wages, hours of employment, [and] other conditions of employment" are permissible. 29 U.S.C. § 159(a). In sharp contrast, and as a limitation on the labor movement's right to restrain other avenues of commerce, the Sherman Act expresses the overriding policy choice that competition in the marketplace for goods and services shall be free and unrestrained. Allen Bradley Co. v. Local Union No. 3 IBEW, 323 U.S. 797, 806, 65 S. Ct. 1533, 1538 (1945); Connell Construction Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616, 622, 95 S. Ct. 1830, 1835 (1975) ("labor policy requires tolerance for the lessening of business com-

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14/ The nonstatutory exemption to the antitrust laws is not applicable where an agreement is found to violate the NLRA. Consolidated Express, Inc. v. N.Y. Shipping Association, 602 F.2d 494 (3rd Cir. 1979), vacated and remanded, 448 U.S. 902 (1980).

petition based on differences in wages and working conditions . . . . [there is] no similar protection when a union and a nonlabor party agree to restrain competition in the business market"). Thus, the case credited with originating the non-statutory exemption focused upon whether the restraints at issue acted primarily upon the labor market or upon commercial competition. Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982 (1940). Furthermore, this distinction between union efforts aimed at the labor market and those aimed at the product market has even been applied to a collective bargaining agreement. Allen Bradley, supra.

The labor-business market distinction has been widely recognized and applied by the Circuit Courts. For example, in Consolidated Express, Inc. v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1979), vacated on other grounds, 448 U.S. 901 (1980), the court explained that "the rationale of the exemption is the protection of the union's power to eliminate competition in the labor market over wages and working

conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act." Id. at 514. Similarly, in Mid-America Regional Bargaining Assoc. v. Will County Carpenters Dist. Council, 675 F.2d 881 (7th Cir.), cert. denied, 459 U.S. 860 (1982), the Court emphasized that "[w]here an agreement primarily affects the labor market, the policy favoring collective bargaining is preeminent, but when an agreement has a direct impact on the business market, the antitrust laws are of greater concern" Id. at 892 n.29. (Emphasis supplied). The Mid-America court also noted: "The Consolidated Express court recognized, therefore, that the central examination in Connell was whether there was a direct restraint on business." (Emphasis supplied). This rationale was also enunciated in Larry V. Muko v. Southwestern Pennsylvania Building & Construction Trades Council, 609 F.2d 1368, 1373 (3d Cir. 1979) (en banc), cert. denied, 459 U.S. 916 (1982) where the court found the labor exemption inapplicable to an agreement between a purchaser of building services and local unions to

exclude nonunion contractors from a jobsite. See also United States v. Olympia Provision & Baking Co., 282 F. Supp. 819 (S.D.N.Y. 1968), aff'd, 393 U.S. 480 (1969) (where members of a local union conspired with manufacturers to refuse to deal with nonunion distributors, activities were aimed at commercial competition, and antitrust considerations must prevail over labor interests).

In the instant case, the restraint is on commercial competition (the exclusion of businesses from bidding in the marketplace) and not on the labor market. What emerges here is a logical and consistent connection between Section 8(f) of the NLRA (which requires the employer to be a contractor) and the nonstatutory exemption (which requires the impact to be on the labor market). By incorrectly deciding the 8(f) issue, the Court of Appeals also blurred the distinction between the labor and commercial markets for purpose of the nonstatutory exemption.

C. THE COURT OF APPEALS' NOVEL HOLDING THAT A COMPANY ADMITTEDLY NOT EN-

GAGED PRIMARILY IN THE CONSTRUCTION INDUSTRY CAN NEVERTHELESS QUALIFY UNDER SECTION 8(f) FOR AN EXEMPTION TO THE ANTITRUST LAWS WILL DRAMATICALLY LESSEN COMPETITION AND RAISE COSTS TO CONSUMERS.

The increased costs of union labor is well documented. A recent comprehensive survey of past studies of compensation rates concluded that a cost differential of 59 to 60 percent existed between open and closed shop construction contractors. H. R. Northrup, Open Shop Construction Revisited, Major Industrial Research Unit Studies No. 62, at 522 (The Wharton School, University of Pennsylvania, 1984). The study concluded that "if labor is assumed to be 24 percent of the total cost of a project, then all other things being equal, the open shop contractor's total cost of production will be at least 8 percent lower as a result of the wage differential alone." Id. An example of the cost differential between union and open shop contractors is graphically illustrated by the studies of a large Fortune 500 company. In a 1977 study comparing sixty-two

similar projects on which both union and open shop tradesmen were employed, the company found that those projects performed by open shop contractors showed a 22% savings in labor costs and a 6% reduction in total project costs, at a ten-year savings of some $400 million. Cockshaw's Construction Labor News & Opinion, Vol. 13, No. 7 (July 1983). (Appendix, p. 66a). Furthermore, a study done in 1984 comparing the hourly wage rates of union and nonunion employees reveals that union wages range from 54.5% to 70.7% in excess of those of nonunion employees. (Appendix, p. 69a).

Studies have also shown that union employment (as a percentage of the total employment) is dropping. More than 60% of the employees nationwide are now nonunion. Northrup, supra, pp. 102-103. Although union employees do more overall nuclear power plant construction, in the Southeast and Southwest, nonunion employees do 41.8% and 60% of the work respectively. (Appendix, p. 68a).

Although these statistics demonstrate that participation in unions is dropping, they reveal that the

labor movement is still a dominant force in the construction industry. This case presents a vivid illustration of precisely the type of abusive industry and market power that the Sherman Act was intended to prohibit. It is conceded that the labor exemption precludes any inquiry into market power when employers and unions agree on those subjects within the traditional scope of exemption: wages, hours, and conditions of employment. When, however, a group of unions affect a commercial rather than labor decision, an inquiry into those unions' market power and ability to exclude non-union competition is warranted. See, e.g., United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 394-404, 76 S. Ct. 994, 1008-12 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 808-14, 66 S. Ct. 1125, 1138-41 (1946). The evidence before the District Court suggested that the Project Agreement was reached only through improper market pressure directed at the commercial decision-making processes of Georgia Power.

In the instant case, not only was Adams excluded from the Plant Vogtle Project because it was a nonunion

contractor, it was excluded even though it was willing to comply with all of the terms of the Project Agreement, hire only union employees from the union hiring halls, pay union wages and benefits, hire only union subcontractors, and observe union working conditions and rules. (Adams Depo., p. 108). Adams submitted the low bid for the work on the Administration Building while calculating its bid price based on union wage scales. Adams' exclusion under such circumstances falls within Connell's admonition that "curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers." 421 U.S. at 623 (emphasis added). Here, the actions of Georgia Power and its co-conspirators violate the very language, as well as the spirit, of Connell. Adams would have had no nonunion employees or subcontractors working for it.

This Court in Woelke & Romero, supra, supports plaintiff's view of the applicable law. The Woelke and Romero court was specifically concerned with friction

between union and nonunion employees. As this Court said:

> It is important to recognize, however, that reducing jobsite friction is a legitimate purpose. The clauses at issue here serve this goal by insuring that members of the respondent unions need not work alongside nonunion employees.

456 U.S. at 662 n.14, 102 S. Ct. at 2081 n.14. (Emphasis added).

Similarly, the union's interest in protecting wage rates and benefits was not served by excluding Adams from the Plant Vogtle Project. In Donald Schriver, supra, the court noted that a fundamental purpose of subcontracting agreements has been to protect contract standards by establishing uniform wage rates and benefits:

> Employees working under a collective bargaining agreement on a construction site have an interest in not being replaced through subcontracting by other workers willing to do the same work without the same compensation or benefits . . . [t]heir interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their employer works whether he

> does the work himself or subcontracts it out.

635 F.2d at 881. In the instant case, because Adams was willing to comply with all terms of the Project Agreement, the exclusion of Adams from work at the Plant Vogtle Project in no way furthered the union's interest in maintaining contract standards. In addition, by excluding Adams, union employees were not protected. Only union businesses were. The labor exemption is designed to protect union employees, not union companies.

The fact that Georgia Power, over a period of nine years (1974-1983), has directly hired no craft employees from at least four of the thirteen unions signatory to the Project Agreement,[15] shows that

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15/ One of these unions, (IBEW), furnishes major segments of the manpower for the construction work at the Project. When asked whether Georgia Power had directly hired at the Plant Vogtle Project any employees from Local 1579 of the IBEW, Mr. Mitchell, the chief negotiator of the Project Agreement, let it be known that Georgia Power was acting as the owner, not as a contractor, at the Project:

A: " Off the top of my head, I do not know. I would assume that they were not, and that we probably had an electrical contractor do it. We could not find any,

Georgia Power negotiated the Project Agreement in its role as an owner, not as an employer of union labor.

Moreover, even assuming arguendo that the Project Agreement is generally deemed to be a collective bargaining agreement, it cannot be considered, under any circumstances, a collective bargaining agreement as to those unions from which Georgia Power never hired any craftsmen for the construction of Plant Vogtle. Consequently, as to those unions from which Georgia Power hired no craft employees, the labor exemption cannot apply. Otherwise, labor unions and nonlabor parties could easily enter into sham agreements with no intent to apply its terms to employees of the nonlabor party and accomplish the very objective Connell determined was forbidden. This contention of Adams was not addressed by the Court of Appeals.

Georgia Power in fact used numerous nonunion contractors and nonunion workers on Plant Vogtle.

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period. The IBEW doesn't exactly like to let owners hire their people." (Mitchell Depo., p. 106) (emphasis supplied).

According to its own interrogatory answers, Georgia Power used as many as nine nonunion contractors at the Plant Vogtle site. (Georgia Power Company's Answers And Objections To Plaintiff A. L. Adams Construction Company's Second Interrogatories To Defendant Georgia Power Company, at p. 13). Further, nonunion warehouse workers unloading and storing material often worked side by side with union craftsmen at Plant Vogtle. (Johnston Depo., p. 369).

The practical consequences of the lower court's decision are likewise of considerable significance. Not only has an entire class of contractors been excluded from 7.2 billion dollars of work at Plant Vogtle (and perhaps at future projects as well), but if the lower court's decision is allowed to stand, it will mean that a company outside the construction industry can come in and unionize an industry in which it has no vested interest. This is even beyond what this Court condemned in Connell, supra, and what the Third Circuit condemned in Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Constructon Trades Council,

609 F.2d 1368 (3rd Cir. 1979) (en banc), cert. denied, 459 U.S. 916 (1982).

VI.

CONCLUSION

This case presents important issues concerning the interrelationship between the nation's antitrust and labor laws. Never before has a union, or group of unions, been permitted to combine with an owner of a construction project to exclude nonunion companies from the commercial market. In this case, the exclusion is made more significant by the fact that the owner is a utility company, which passes its higher costs directly to the public in the form of higher electric bills.

The court below substantially misconstrued Section 8(f) of the NLRA by holding that "engaged primarily in the building and construction industry" merely means "sufficiently engaged in construction work at one site." The lower court also erred in finding, on summary judgment, that Georgia Power was "presumably" engaged in construction work when

Georgia Power hired no craft employees at the site after construction work began.

Petitioner respectfully submits that the lower court's decision is of immense legal and practical significance to the entire construction industry and certiorari should be granted.

Respectfully submitted,

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March 4, 1985

APPENDIX

A.L. Adams Construction Company,

Plaintiff-Appellant

v.

Georgia Power Company,

Defendant-Appellee.

No. 83-8094.

United States Court of Appeals,

Eleventh Circuit.

June 4, 1984

Appeal from the United States District Court

for the Southern District of Georgia

Before FAY and HENDERSON, Circuit Judges, and BOYLE*, District Judge.

ALBERT J. HENDERSON, Circuit Judge:

A.L. Adams Construction Company (Adams) appeals from the grant of summary judgment to

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*Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

Georgia Power Company (Georgia Power) by the United States District Court for the Southern District of Georgia. A.L. Adams Construction Co. v. Georgia Power Co., 557 F. Supp. 168 (S.D. Ga. 1983). The sole issue is whether Georgia Power entered into a conspiracy to exclude Adams from participation in the construction of the Alvin W. Vogtle Nuclear Project in Burke County, Georgia, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.[1/] Finding no reversible error, we affirm the judgment of the district court.[2/]

At all times relevant to this appeal, Georgia Power was the principal owner of the Plant Vogtle project, located approximately forty miles from Augusta, Georgia. In 1974, the Augusta Building and Trades Council, as the representative of the local unions, and Georgia Power entered into a project agreement covering all construction work at the power plant except fence erection. The project agreement provides the terms and conditions of work at the site. Craft workers who seek employment at

Plant Vogtle must be referred by the unions through union hiring halls. Initially, Georgia Power hired approximately 150 craftsmen for construction work. Since 1978, however, Georgia Power has not employed any craft workers and at no time did Georgia Power hire any members of four of the thirteen unions which are parties to the project agreement. Georgia Power did not obtain the services of a general contractor to manage the construction, but supervised and coordinated the work with its own employees.[3/]

One part of the Plant Vogtle project was the erection of the administration building. In March, 1980, Georgia Power solicited bids for the building from six contractors, including Adams. All the bids were rejected when Georgia Power discovered that the low bid was made by a nonunion contractor. Georgia Power had decided to employ only union contractors on the project. A few months later, Georgia Power solicited more bids, all from union contractors. Because it employed nonunion workers, Adams was not initially invited to bid but Adams

assured Georgia Power that it would comply with the project agreement if it were awarded the contract.

Adams submitted the lowest bid. Representatives of Georgia Power and Southern Company Services, Inc. (Southern)[4/] met with Adams to determine whether Adams could comply with Georgia Power's requirement to use union contractors. Deciding that Adams' proposed arrangements were not satisfactory, Georgia Power rejected Adams' bid and awarded the contract to the next lowest bidder, Mobley Construction Company, a union contractor. It is undisputed that Adams was excluded because it was a nonunion contractor.

In a comprehensive opinion, the district court addressed whether the project agreement or Georgia Power's dealings with Southern constituted conspiracies in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1. Citing Connell Construction Co. v. Plumbers and Steamfitters Local No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L.Ed.2d 418 (1975), the district court held that the project agreement, if part

of a collective bargaining relationship, was immune to attack under labor's nonstatutory exemption to the antitrust laws[5/] and the construction industry proviso to § 8(e) of the National Labor Relations Act (N.L.R.A.) 29 U.S.C. § 158(e).[6/] See also Woelke & Romero Framing, Inc. v. N.L.R.B., 456 U.S. 645, 666, 102 S. Ct. 2071, 2083, 72 L.Ed.2d 398, 415 (1982). The district court found the requisite collective bargaining nexus because the project agreement qualified as a valid prehire agreement under § 8(f) of the N.L.R.A., 29 U.S.C. § 158(f).[7/] Having held that the project agreement to exclude nonunion contractors did not violate the antitrust laws, the district court determined that Southern's participation was also lawful.

I.

The United States Supreme Court considered the reach of the construction industry proviso in Connell, supra. Local 100, which represented plumbing and mechanical workers, had an agreement with the Mechanical Contractors Association, a large

group of contractors, which provided that the contractors would subcontract mechanical work only to those firms which had an agreement with Local 100. In addition, if the union gave better terms to other contractors, it agreed to extend the same terms to the parties to the agreement. The Connell Construction Company (Connell) refused to sign the agreement and the local picketed one of its job sites, causing delays. The union, however, admitted that it did not seek to represent any of Connell's employees. Connell signed under protest and sued the union for violations of the Sherman Act.

The union claimed the agreement was exempt from the antitrust laws because it qualified under the construction industry proviso in § 8(e). Although the statutory language is unqualified, the Court indicated that it should be interpreted in light of Congressional intent. Thus the proviso's exemption

> extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, [NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95

> L.Ed. 1284 (1951)] possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633, 95 S. Ct. at 1840, 44 L.Ed.2d at 432 (footnote omitted). Because Local 100's agreement was not part of a collective bargaining relationship and extended beyond a particular jobsite, it was not insulated from the antitrust laws.

The Court again examined the legislative history of the construction industry proviso in Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 102 S. Ct. 2071, 72 L.Ed.2d 398 (1982). The employers in that case maintained that the "hot cargo" clauses — preventing use of nonunion subcontractors — constituted unfair labor practices under § 8(e). The contract clauses at issue were similar to the provisions of the project agreement in this case, "they require the general contractor to boycott the services of nonunion subcontractors in order to influence the labor relations policies of the subcontractor." 456 U.S. at 653, 102 S. Ct. at 2076, 72 L.Ed.2d at 406.

The Court concluded that Congress did not intend to alter the status quo by the addition of § 8(e)

to the N.L.R.A.[8/] and that collective bargaining agreements limiting subcontracting to union contractors were legal prior to the enactment of § 8(e).[9/] Thus,

> the construction industry proviso to § 8(e) of the [N.L.R.A.] ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed.

Id. at 666, 102 S. Ct. at 2083, 72 L.Ed.2d at 415. Any added pressure on a subcontractor to unionize was acceptable provided that the subcontracting clause was achieved within a collective bargaining relationship. See Brogan v. Swanson Painting Co., 682 F.2d 807, 810-11 (9th Cir. 1982) (restrictive subcontracting clause in context of a collective bargaining agreement not a violation of the antitrust laws).

II.

To claim the antitrust exemption under § 8(e), therefore, Georgia Power must show that the project agreement was arrived at within a collective bar-

gaining framework. At the time of the agreement no work had begun on the project and no workers had been hired. Hence, the Augusta Building and Trades Council did not qualify as the elected bargaining representative of the employees. It therefore was unable to enter into a standard collective bargaining contract within the meaning of 29 U.S.C. § 159.

[1] A collective bargaining relationship may be established through a valid prehire agreement executed in accordance with § 8(f). Donald Schriver, Inc. v. N.L.R.B., 635 F.2d 859, 872-76 (D.C. Cir. 1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2058, 68 L.Ed.2d 357 (1981). Agreeing with the National Labor Relations Board (Board), Los Angeles Building and Construction Trades Council, 239 N.L.R.B. 264, 268 (1978), the court stated that:

> [s]ince § 8(f) provides the very means of which unions and employers typically initiate a bargaining relationship in the construction industry, we reject the employers' argument that an § 8(f) relationship is insufficient to satisfy the collective bargaining requirement of Connell.

635 F.2d at 873.[10/] After examining the legislative

history, the court held "that a subcontracting agreement sought in the context of an § 8(f) prehire agreement does not violate § 8(e)." Id. at 875.

[2] Section 8(f) only applies to employers "engaged primarily in the building and construction industry." Admittedly, the major portion of Georgia Power's business involves the production and sale of electricity. In spite of this statutory restriction, Georgia Power may still seek the protection of § 8(f). The Board has determined that an employer, although largely involved in nonconstruction industries, may take advantage of § 8(f) if it is sufficiently engaged in construction work at one site.

This question was considered by the Board in Zidell Explorations, Inc., 175 N.L.R.B. 887 (1969). Zidell contracted with the federal government to dismantle a ballistic missile complex. In determining whether Zidell qualified under § 8(f), the Board noted that

> [a]lthough the Trial Examiner found Zidell's primary field of activity to be shipbuilding, thereby disqualifying it from the § 8(f) exemption, the record is clear that Zidell's

> entirely separate operation at the missile site was consonant with the Congressional purposes and objectives of the 8(f) exemption.

Id. at 889.

Zidell has been followed in later decisions of the Board. In Hoover, Inc., 240 N.L.R.B. 593 (1979), the Board, adopting the opinion of the administrative law judge, remarked that Zidell's main business was shipbuilding but "in the facts of that case, Zidell's employees were in an entirely different operation, the dismantling of a ballistic missile complex, which was itself construction work." Id. at 599. Moreover, although not primarily engaged in the construction industry on the site in issue, at

> other locations of this employer, it was clearly engaged in the construction of buildings, and . . . at those sites was admittedly primarily engaged in construction and at those locations could effectuate 8(f) agreements.

Id. at 599 n. 17. Finally, § 8(f) "has also been applied to employers whose general business is not in the industry, but who are engaged in construction work on a specific project." Construction, Building Materials

& Miscellaneous Drivers, Local 83, 243 N.L.R.B. 328, 331 (1979) (footnote omitted).

Adams attempts to distinguish these cases, pointing out that employers such as Zidell did some of the actual construction work themselves while Georgia Power currently employs no craft workers. Such an argument is unpersuasive.[11/] The Board did not base its decisions on whether and to what extent the individual contractors performed the construction jobs. Adams cites two cases for the proposition that a contractor's employees must do the actual construction work to qualify under § 8(f). In N.L.R.B. v. W.L. Rives Co., 328 F.2d 464 (5th Cir. 1964), the court held that manufacturers of materials are not primarily engaged in the construction industry. The court in United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 91 v. Kimberly-Clark Corp., 93 L.R.R.M. 2702 (N.D. Ala. 1976) noted the lack of involvement of Kimberly-Clark's employees in the actual construction work only to refute the union's contention that

its members previously were assigned the construction work at issue.[12/] Neither case supports Adams' reasoning.

If Adams' argument should prevail, some general contractors, which are primarily involved in the construction industry, could never qualify under § 8(f). They may subcontract the entire project and only manage and coordinate the work, as did Georgia Power in this case. Yet if they did not perform any actual construction work themselves on that project Adams would have us hold that they were not entitled to the § 8(f) exemption although the contractor's entire business is associated with building and construction. In any event, for the first four years of the project agreement, Georgia Power did employ craft workers who presumably engaged in construction work. Georgia Power and the unions should not be penalized because Georgia Power acted as its own general contractor instead of hiring an outside contractor, which, undoubtedly, would meet the requirements of § 8(f).

The project agreement, therefore, satisfies the requirements of § 8(f) for valid prehire agreements. As such, it provides the collective bargaining relationship necessary for the exemption from the antitrust laws under the construction industry proviso in § 8(e).

III.

Because the project agreement is lawful, we agree with the district court that the role played by Southern does not violate the antitrust laws. Southern and Georgia Power acted in concert to carry out the terms of the project agreement. Regardless of whether their relationship is characterized as a separate "conspiracy" from that alleged between Georgia Power and the unions, there was no illegal conspiracy to restrain trade. The district court correctly granted summary judgment to Georgia Power on Adams' antitrust cause of action.

FOOTNOTES

1/ Section 1 provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. Violations of this section entitle the injured party to treble damages. 15 U.S.C. § 15.

2/ In its complaint, Adams also included a state law claim for breach of contract against Georgia Power. The district court denied both parties' motions for summary judgment on this count. In a separate appeal, this court affirmed the denial of Adams' motion on the contract cause of action. A.L. Adams Construction Co. v. Georgia Power Co., 557 F. Supp. 168, 177 (S.D. Ga. 1983), aff'd, 733 F.2d 853 (11th Cir. 1984).

3/ One court stated that "Georgia Power, for itself and as agent for the other owners, oversees the entire [Plant Vogtle] project." Luke v. Owsley and Sons, Inc., No. CV 181-129, opinion at 2 (S.D. Ga. 1982). Georgia Power provides all the contractors' equipment, pays their insurance and sets the work schedules and rules. The contractors can hire only the number of employees authorized by Georgia Power. Georgia Power "controls the time, manner and method of the construction . . . ." Id. at 3. Because of its pervasive authority, the court held that Georgia Power, for worker's compensation purposes, was the employer of even the contractor's employees. Such involvement undermines Adams' argument that Georgia Power did not act as a contractor on the site.

4/ Georgia Power and Southern are subsidiaries of the Southern Company. Southern was involved with many of the aspects of the Plant Vogtle Project.

5/ Because of our resolution of this case, we express no opinion regarding the application of the nonstatutory exemption to these facts. For a discussion of this exemption, see P. Arreda, Antitrust Analysis 110-12 (1981), L. Sullivan, Antitrust 723-31 (1977); Hoffmann, Labor and Antitrust Policy: Drawing a Line of Demarcation, 50 Brooklyn L.Rev. 1, 25-36 (1983); St. Antoine, Connell; Antitrust Laws at the Expense of Labor Law, 62 Va.L.Rev. 603, 604-16 (1976).

6/ Section 8(e) provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided,
>
> That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

29 U.S.C. § 158(e).

7/ Section 8(f) states, in part, that

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building

and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice.)

29 U.S.C. § 158(f).

8/ The Court stated that

> [i]n these cases, we decide a question left unresolved in Connell; the extent to which the proviso shelters agreements sought or obtained within the context of a collective-bargaining relationship.

456 U.S. at 653 n. 8, 102 S. Ct. at 2076-77 n. 8, 72 L.Ed.2d at 407 n. 8.

9/ Congress amended the N.L.R.A. and added § 8(e) through the Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 543-44 (1959). Senator John Kennedy stated during the debates that

> [a]greements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e).

105 Cong. Rec. 17900 (1959), 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1433.

10/ Adams asserts that owners of construction projects cannot benefit from the provisions of § 8(f). Yet the court in Schriver characterized the contractor as the "owner-builder" of an apartment

complex. 635 F.2d at 863. Furthermore, we see no basis to distinguish between utility projects and construction of other types of facilities.

11/ In discussing whether a company was an employer in the construction industry under § 8(e), W. Bruce Gillis, Regional Director of the N.L.R.B., wrote "[i]t is immaterial that Deseret is not doing any actual construction nor that its primary business once the Moon Lake Project is completed will be the operation of the power plant." Letter to Neil Andrus, Esq. (April 16, 1982), re International Union of Operating Engineers, Local 3, Case No. 27-CE-27 at 2.

12/ Admittedly, a contractor's involvement in the construction must be more than negligible. Frick Company, 141 N.L.R.B. 1204, 1208 (1963). But, as the district court stated, "[t]here can be no genuine denial . . . that Georgia Power's involvement in the construction process . . .[is] more than negligible." 557 F. Supp. at 176. See note 3, supra.

A.L. Adams Construction Co.

Plaintiff,

v.

Georgia Power Company,

Defendant.

Civ. A. No. CV 181-31.

United States District Court,

S.D. Georgia,

Augusta Division.

Jan. 3, 1983.

ORDER

ALAIMO, Chief Judge.

On February 16, 1981, A.L. Adams Construction Company filed a civil complaint in this Court against Georgia Power Company. The plaintiff alleged that it was refused a job as building contractor at defendant's construction site in Burke County, Georgia, because plaintiff was a nonunion contractor. In Count 1 of the complaint, plaintiff contends that defendant's refusal to hire plaintiff was the result of a combination and conspiracy between defendant and

others to exclude nonunion contractors from working at the Burke County construction site. Count 1 alleges that such a combination and conspiracy violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; plaintiff, therefore, seeks to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, for injuries to its business and property caused by defendant's antitrust violation. In Count 2, plaintiff contends that the refusal to hire it constituted a breach of contract by defendant.

This case is presently before the Court on plaintiff's motion for summary judgment filed October 12, 1982, and defendant's motion for summary judgment filed October 13, 1982.[1/] For the reasons stated below, plaintiff's motion is DENIED, and defendant's motion is GRANTED as to Count 1 (the antitrust claim) but DENIED as to Count 2 (the contract claim).

ANTITRUST CLAIM

A. Agreement with Trades Council

1. Facts

The following facts pertinent to plaintiff's antitrust claim are either undisputed, are disputed without reasonable justification in the record, or may be assumed in plaintiff's favor for purposes of defendant's motion for summary judgment with regard to the antitrust claim:

(a) A. L. Adams Construction Company ("Adams") is a nonunion contractor operating in the building and construction industry.

(b) Georgia Power Company ("Georgia Power") is an investor-owned electric utility company whose common stock is wholly-owned by The Southern Company, a registered public utility holding company.

(c) Georgia Power currently has under construction in Burke County, Georgia, a nuclear-powered generating facility which is known as Plant Vogtle. Georgia Power owns a 50.7% undivided ownership interest in Plant Vogtle.

(d) In early 1982, the total cost of completing Plant Vogtle was estimated to be five and one-half billion dollars ($5,500,000,000.00).

(e) Georgia Power hired no general contractor to supervise the overall progress of the Plant Vogtle project, preferring instead to act as its own "construction manager" while subcontracting all the major phases of the job to other contractors.

(f) Over a period of several months prior to beginning construction on Plant Vogtle, Georgia Power negotiated an agreement known as the Plant Vogtle Project Agreement with the construction trade unions from the Augusta area, who were represented by the Augusta Building and Trades Council. The agreement set many of the terms and conditions of employment for craft workers employed at Plant Vogtle.

(g) The Project Agreement was binding on Georgia Power, and its terms were intended to apply also to any subcontractors hired by Georgia Power.

(h) From the time of the making of the Agreement ot the present, the only business activity

conducted by Georgia Power at the Plant Vogtle site has been the construction of the Plant.

(i) Subsequent to the negotiation of the Project Agreement, Georgia Power employed on its own payroll approximately 150 craft workers referred to it under the provisions of the Project Agreement to perform construction work at Plant Vogtle. These workers were hired from eight or nine of the thirteen unions signatory to the Project Agreement. At present, Georgia Power has hired no craft workers from four of the signatory unions.

(j) In March of 1980, Georgia Power invited six contractors, including Adams, to submit bids on the contract for construction of the Administration Building at Plant Vogtle. Three of the invited contractors submitted bids, and Adams' bid was the second lowest. Georgia Power, however, rejected this round of bids because only one of the companies submitting bids was a union contractor and the low bidder was a nonunion contractor.

(k) On the second round of bidding for the Administration Building, six contractors, including

Adams, submitted bids. The bid submitted by Adams was the lowest in total dollar amount. After some discussion between Georgia Power and Adams about how Adams could satisfy Georgia Power's requirement of all-union contractors, Georgia Power decided to reject Adams' bid and awarded the contract to the next lowest bidder, Mobley Construction Company, which was a union contractor.

(1) Because Adams was a nonunion contractor, Georgia Power refused to grant Adams the contract to construct the Administration Building.

2. The Alleged Restraint of Trade

Adams contends that the Project Agreement negotiated by Georgia Power with the Trades Council of Augusta was intended to, and had the effect of, limiting the subcontracting of work at Plant Vogtle to union subcontractors and that such a limitation constitutes a conspiracy or combination to restrain trade, in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Adams further contends that, but for this alleged agreement, Adams would have been

permitted to perform the construction work on the Administration Building at Plant Vogtle.

Georgia Power denies that the Project Agreement prevents the owner from hiring nonunion subcontractors and contends that it decided unilaterally to use only union subcontractors in order to insure labor harmony at Plant Vogtle. Georgia Power alternatively argues that, even assuming that it entered into an agreement with the Trades Council to exclude nonunion contractors from Plant Vogtle, such an agreement is protected from antitrust penalties by the nonstatutory labor exemption that has developed in the federal courts. Georgia Power also contends that the alleged agreement to exclude nonunion contractors is expressly authorized by the construction-industry proviso to § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and therefore cannot be a violation of the antitrust laws. Since both of the exemptions claimed by Georgia Power were analyzed by the Supreme Court in Connell Construction Company v. Plumbers and Steamfitters,

Local No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L.Ed.2d 418 (1975), that case provides the cornerstone for analysis of the present case.

3. Supreme Court Background

In Connell, Local 100 was the bargaining representative for workers in the plumbing and mechanical trades in Dallas. Connell Construction Company of Dallas was a general construction contractor that subcontracted all plumbing and mechanical work to other firms. Id. at 619, 95 S. Ct. at 1833, 44 L.Ed.2d at 424. Since Connell never directly hired any plumbers or mechanical workers, Local 100 never represented — and expressly disclaimed any interest in representing — Connell employees. Id. Local 100 did seek an agreement from Connell that the contractor would subcontract its mechanical work only to firms that had a collective-bargaining agreement with Local 100. Id. When Connell refused to enter into this agreement, Local 100 picketed one of Connell's major jobsites, causing a work stoppage and forcing Connell to sign the agreement under protest. Id. at

620, 95 S. Ct. at 1834, 44 L.Ed.2d at 425.

Connell argued in federal court that the agreement violated the Sherman Act provisions against monopolies and restraints of trade and was, therefore, invalid. Id. The Supreme Court considered two defenses raised by the union: (1) organized labor's nonstatutory exemption from federal antitrust law; and (2) the primacy of the construction-industry proviso to § 8(e) of the NLRA over antitrust policy.

With regard to the nonstatutory labor exemption, the Court acknowledged that, in such cases as Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965), and Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L.Ed.2d 640 (1965),[2/] it had recognized "that a proper accommodation between the congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622,

95 S. Ct. at 1835, 44 L.Ed.2d at 425-426. [3] The Court determined, however, that since Local 100 had no interest in representing Connell's employees, the "federal policy favoring collective bargaining . . . can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market." Id. 421 U.S. at 626, 95 S. Ct. at 1837, 44 L.Ed.2d at 428. The Court clearly indicated that, in other contexts, a restraint on subcontracting "might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." Id. (emphasis added).

[1] Thus, in the present case, if it can be shown as a matter of law that the alleged agreement restricting subcontracting was the product of a collective-bargaining process, the policy favoring collective bargaining might well shelter the agreement from antitrust scrutiny.[4]

With respect to the argument of Local 100 that the kind of agreement it obtained from Connell was

explicitly condoned by the construction-industry proviso to § 8(e) and that antitrust policy must, therefore, defer to the NLRA, the Court, in rejecting the union's position, once again focused on the lack of a collective-bargaining relationship between Connell and Local 100.

The relevant portions of § 8(e) provide:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided,
>
> That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

29 U.S.C.A. § 158(e).

In Connell, the Supreme Court acknowledged that a literal interpretation of the construction-

industry proviso would not limit the provision to agreements resulting from the collective-bargaining process. The Court nevertheless determined that "Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that is, Congress did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors." 421 U.S. at 627-628, 95 S. Ct. at 1837, 44 L.Ed.2d at 429 (emphasis added). The Court reached this conclusion by examining the purposes of the proviso as reflected in the comments and reports of the legislators who formulated and passed the provision.[5/] The Court recognized especially that the proviso reflected the "close community of interests" of workers on a construction site and the inherent possibilities for friction when union subcontractors work alongside nonunion subcontractors at a particular jobsite.

The Court noted that the agreement between Local 100 and Connell had no relationship to these

policy considerations, since the agreement was with a "stranger" contractor and was not limited to any particular jobsites. Id. at 631, 95 S. Ct. at 1839, 44 L.Ed.2d at 431. The Court stated:

> Local 100 does not suggest that its subcontracting agreement is related to any of these policies. It does not claim to be protecting Connell's employees from having to work alongside nonunion men. The agreement apparently was not designed to protect Local 100's members in that regard, since it was not limited to jobsites on which they were working. Moreover, the subcontracting restriction applied only to the work Local 100's members would perform themselves and allowed free subcontracting of all other work, thus leaving open a possibility that they would be employed alongside nonunion subcontractors. Nor was Local 100 trying to organize a nonunion subcontractor on the building project it picketed. The union admits that it sought the agreement solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees.

Id.

The Court indicated that these deficiencies resulted in large part from the lack of a collective-bargaining relationship between the parties. The Court, therefore, held that because the agreement was "outside the context of a collective bargaining

relationship and not restricted to a particular jobsite," it was not authorized by the construction-industry proviso and was subject to attack under the antitrust laws. Id. 421 U.S. at 635, 95 S. Ct. at 1841, 44 L.Ed.2d at 433.

In Woelke & Romero Framing, Inc. v. NLRB, _____ U.S. _____, 102 S. Ct. 2071, 72 L.Ed.2d 398 (1982), the Supreme Court recently amplified the reasoning of Connell with regard to the construction-industry proviso. Writing for a unanimous Court in Woelke, Justice Marshall stated:

> [In Connell] the Court concluded . . . that the protection of the [construction industry] proviso "extends only to agreements in the context of collective-bargaining relationships." Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 633, 44 L.Ed.2d 418, 95 S. Ct. 1830. In this case, we decide a question left unresolved in Connell: the extent to which the proviso shelters agreements sought or obtained within the context of a collective bargaining relationship.

_____ U.S. at _____ n. 8, 102 S. Ct. at 2076-77 n. 8, 72 L.Ed.2d at 407 n. 8. The Court determined that when a restrictive subcontracting clause is "sought or negotiated within the context of a collective bar-

gaining relationship," the clause is protected by the construction-industry proviso, even if the clause is "not limited in application to particular jobsites at which both union and nonunion workers are employed." Id. at _____, 102 S. Ct. at 2083, 72 L.Ed.2d at 415. In reaching this conclusion, the Court extensively discussed the legislative history of § 8(e) and found that Congress added the construction-industry proviso to § 8(e) with the intention of maintaining the then-existing pattern of collective bargaining in the construction industry, including broad subcontracting restrictions. Id. at _____, 102 S. Ct. at 2081-82, 72 L.Ed.2d at 413. The Court acknowledged that such agreements create a "top-down" pressure for unionization, but the Court determined that:

> Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship — and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.

Id. Thus, in Woelke, the Court concluded that the protection of the construction-industry proviso is broad when subcontracting agreements are the product of collective bargaining. In light of Woelke, the Ninth Circuit very recently held a subcontracting clause "sought or negotiated" in the context of a collective-bargaining relationship was protected by the construction-industry proviso and was not, therefore, a violation of the antitrust laws. Brogan v. Swanson Painting Co, 682 F.2d 807 (9th Cir. 1982).

Thus, in light of Connell and Woelke, it appears that to qualify for either the nonstatutory labor exemption or the antitrust immunity implicit in the construction-industry proviso, the Project Agreement signed by Georgia Power and the Trade Council must have been negotiated in a collective-bargaining context.[6/]

4. The Collective-Bargaining Relationship

Georgia Power makes no claim that, at the time the Project Agreement was negotiated and signed, the Trades Council was the designated bargaining agent

of a majority of Georgia Power's employees engaged in construction crafts at Plant Vogtle. In fact, at the time the agreement was made, Georgia Power had no employees engaged in the construction crafts at Plant Vogtle. Since the Trades Council had not been elected by a majority of Georgia Power's employees, the Council was not authorized to enter into a standard collective-bargaining agreement according to § 9 of the NLRA. 29 U.S.C. § 159.

Georgia Power does contend, however, that the alleged subcontracting restriction was included in a prehire agreement validated by § 8(f) of the NLRA.[7/] 29 U.S.C. § 158(f). Adams, on the other hand, contends that the Project Agreement does not qualify for § 8(f) treatment because Georgia Power was not and is not an employer primarily engaged in the building and construction industry.

The Supreme Court has held that it is an unfair labor practice under § 8 of the NLRA for an employer and a union to enter into a collective-bargaining agreement, recognizing the union as the

exclusive bargaining representative, when the union has not been authorized by a majority of the employees. Garment Workers v. NLRB, 366 U.S. 731, 737, 81 S. Ct. 1603, 1607, 6 L.Ed.2d 762 (1961). "Section 8(f) of the Act specifically provides, however, that it shall not be an unfair labor practice for an employer [engaged primarily in the building and construction industry] to make an agreement with a labor organization covering employees engaged in the building and construction industry prior to the establishment of majority status for the labor organization." NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981).

[2] Furthermore, in Donald Schriver, Inc. v. NLRB, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2058, 68 L.Ed.2d 357 (1981), the Court of Appeals for the District of Columbia, in a thorough and persuasive consideration of prehire agreements, has held that a valid prehire agreement satisfies the Connell requirement of a collective-bargaining relationship as a prerequisite to appli-

cation of the construction-industry proviso. 635 F.2d at 872-876. In Schriver, the court responded in the following manner to the argument that a § 8(f) relationship is not sufficient to satisfy the "collective-bargaining relationship" requirement of Connell:

> [T]o satisfy Connell, it is irrelevant that the contract is merely a "prehire agreement" authorized by § 8(f) and the union lacks established majority status. . . . Since § 8(f) provides the very means by which unions and employers typically initiate a bargaining relationship in the construction industry, we reject the employers' argument that an § 8(f) relationship is insufficient to satisfy the collective bargaining requirement of Connell.

Id. at 873. In support of this conclusion, the Schriver court looked in detail at the legislative history of § 8(f), concluding that the history of the provision "strongly supports the position that an 8(f) agreement occurs 'in the context of collective-bargaining' in the construction industry." Id. at 874. This Court agrees.

Noting the occasional and intermittent nature of employment in the construction industry, the Senate Report concerning § 8(f) concluded that

standard § 9(a) collective-bargaining relationships are often not feasible in the construction industry. S. Rep. No. 187, 86th Cong., 1st Sess. 55 (1959), U.S. Code Cong. & Admin. News, 1959, pp. 2318, 2373. See Donald Schriver, supra, 635 F.2d at 874. Prehire agreements thus offer some security to employers and employees in an industry where stability is a rare but important commodity. As the court in Schriver so logically stated, "[i]t would make little sense to conclude that this necessary and most common type of collective bargaining relationship in the construction industry, specifically recognized and authorized by Congress, is not a 'collective-bargaining relationship' as that term is used in Connell." 635 F.2d at 874-875.

Finally, specifically addressing restrictive subcontracting clauses contained in prehire agreements, the Court of Appeals stated:

> There is nothing in the legislative history to suggest that prehire agreements are limited to certain terms and conditions of employment, and may not include others. The same Congress that adopted § 8(f) in 1959 added to the newly enacted § 8(e) a proviso

> that expressly authorizes subcontracting agreements in the construction industry. There is no reason why Congress would protect subcontracting agreements in the construction industry under § 8(e), and at the same time prohibit the most common and possibly the only effective means by which such an agreement may be obtained. We hold, therefore, that a subcontracting agreement sought in the context of an § 8(f) prehire agreement does not violate § 8(e). Id. at 875.

(Emphasis added.)

[3] Thus, if the Plant Vogtle Project Agreement qualifies as a valid prehire agreement under § 8(f), the collective-bargaining context that was absent in Connell would be present in the instant case; and, according to Woelke and Schriver, the protection of the construction-industry proviso would be available to Georgia Power. Adams, however, argues vigorously that the Project Agreement between Georgia Power and the Trades Council does not qualify as a valid prehire agreement in the construction industry under § 8(f). Adams' strongest contention[8/] is that Georgia Power is not "an employer engaged primarily in the building and construction industry" within the meaning of § 8(f) nor

"an employer in the construction industry," as required by the construction-industry proviso. Common sense and a review of the applicable law reveal that Adams' argument must fail.

In Zidell Explorations, Inc., 175 N.L.R.B. 887 (1969), the National Labor Relations Board addressed the issue whether a corporation whose primary activity was shipbuilding could enter into a § 8(f) agreement with respect to persons it would employ in the dismantling of a missile site that it had purchased from the Government. Id. at 889. The Board reversed a trial examiner, who had denied Zidell the protection of § 8(f) because its regular business was shipbuilding. The Board observed that it would be anomalous to find that a general contractor doing essentially the same work as Zidell could enter into valid prehire agreements while Zidell could not. Id. The Board then concluded that Zidell's work on the missile site was characteristic of that performed in the construction industry, and it could, therefore, enter into an § 8(f) prehire agreement with regard to

employees who would work at that site, despite the fact that Zidell regularly engaged in other work unrelated to the construction industry. Id.

In 1978, the Board capsulized its Zidell ruling in the following way: "The [§ 8(f)] exemption has also been applied to employees whose general business is not in the industry, but who are engaged in construction on a specific project." Construction, Building Materials & Miscellaneous Drivers, Local 83, 243 N.L.R.B. 328, 331 (1978). In Hoover, Inc., 240 N.L.R.B. 593 (1979) the Board adopted the opinion of the Administrative Law Judge who concluded that the employer was not primarily engaged in the construction industry with respect to a strip coal mine and rock quarries that it operated. The judge noted in a footnote, however, that at "other locations of this employer, it was clearly engaged in the construction of buildings, and that at those sites was admittedly primarily engaged in construction and at those locations could effectuate 8(f) agreements." Id. at 599 n. 17.

It is true that the Board has ruled that § 8(f) does not apply to an employer who has only a negligible involvement in the construction in process. See Frick Company, 141 N.L.R.B. 1204, 1208 (1963). There can be no genuine denial of the fact that Georgia Power's involvement in the construction process at the Plant Vogtle site was more than negligible.

[4] Since Georgia Power acted as its own construction manager, foregoing employing a general contractor at Plant Vogtle, the unions naturally looked to Georgia Power as the only employer with authority to negotiate a comprehensive prehire agreement. Had Georgia Power employed a general contractor to do exactly the kind of work its own employees did at Plant Vogtle, there is no doubt that the general contractor would have been qualified to enter into a valid prehire agreement. If Georgia Power is not considered an employer within the construction industry, the unions would be put at a disadvantage simply because Georgia Power chose not

to hire a general contractor. Such an unfair and illogical result can be avoided by simply recognizing the only proper legal conclusion which can be drawn from the uncontroverted facts: Georgia Power was an employer engaged in the construction industry at the Plant Vogtle site and was, therefore, qualified to negotiate a valid prehire agreement under § 8(f) of the NLRA.

The Court, therefore, concludes that the Project Agreement in question was negotiated in the context of a "collective bargaining relationship" as that term is used in Connell and Woelke. Consequently, Georgia Power is entitled to invoke an exemption from antitrust penalties under the construction-industry proviso and the nonstatutory labor exemption.

B. Agreement with Southern Company Services, Inc.

On April 1, 1982, Adams amended its original complaint to include Southern Company Services, Inc. ("Southern"), as a coconspirator with Georgia Power. Adams, in relatively incidental fashion, contends that

its antitrust claims should be sustained on the basis of an alleged conspiracy between Georgia Power and Southern, which are two subsidiaries of The Southern Company.

With regard to Southern's involvement in the alleged conspiracy, Adams makes the following allegations:

> Although Southern was not involved in the original decision to exclude nonunion contractors from the Project (Southern was not involved in the negotiation or execution of the Project Agreement), it did become aware of the Project Agreement, learned that only union contractors could work at Plant Vogtle, and made decisions and recommendations in conformity with the requirements of the Project Agreement. It is black letter law that one who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may be charged with the preceding acts of its co-conspirators.

Brief in Support of A.L. Adams Construction Co.'s Motion for Summary Judgment, 53 (October 12, 1982). Since the Court has concluded that the original decision to exclude nonunion contractors does not violate the antitrust laws, it logically follows that, assuming Southern joined in an agreement, what it

joined was not an existing illegal conspiracy but, rather, an agreement specifically validated by the Nation's labor laws and policies.

Consequently, the Court concludes that there exists no genuine issue of material fact with regard to the claim that Southern and Georgia Power had an agreement to restrain trade in violation of the Sherman Antitrust Act. The Court further concludes that Georgia Power is entitled to judgment as a matter of law as to the allegation of an illegal agreement with Southern.

CONTRACT CLAIM

[5] Having carefully considered the motions for summary judgment by both parties, the Court concludes that several issues of material fact are still in dispute with regard to the contract claim embodied in Count 2 of the complaint. Whether the parties had reached a binding agreement on all crucial terms — especially whether sufficient agreement had been reached on the manner in which Adams would meet Georgia Power's requirements regarding the union

status of contractors — is still vigorously disputed by the parties. Such factual issues must await determination by a trier-of-fact at a trial on the merits. Consequently, both plaintiff's and defendant's motions for summary judgment are DENIED with respect to Count 2 of the complaint.

CONCLUSION

On the basis of the foregoing discussion of the facts and law pertinent to this case, the Court concludes that the Project Agreement in question was negotiated in the context of a "collective bargaining relationship" as that term is used in Connell and Woelke. The Court, therefore, holds that Georgia Power is entitled to exemption from antitrust penalties by virtue of the construction-industry proviso and the nonstatutory labor exemption. Accordingly, defendant's motion for summary judgment is GRANTED with respect to the claims based on liability under the Sherman Act (Count 1 of the complaint), and plaintiff's motion for summary judgment with regard to the antitrust claims is DENIED. Furthermore, both

plaintiff's and defendant's motions for summary judgment are DENIED with respect to Count 2 of the complaint.

FOOTNOTES

1/ Plaintiff argues that, under the terms of an Order entered by this Court on May 10, 1982, all motions to dismiss or for summary judgment were required to be filed by October 12, 1982, and that, since defendant's summary judgment motion was not filed until October 13, 1982, the motion was untimely and should be denied. See Plaintiff's Brief in Response to Defendant Georgia Power Company's Motion for Summary Judgment, 1-4 (November 10, 1982). Since plaintiff claims no prejudice to it resulting from the alleged late filing (plaintiff, in fact, admits being served with a copy of defendant's summary judgment motion on October 12) and since the Court finds considerable merit in defendant's motion, the Court believes that the purposes of justice are better served by considering the merits of defendant's motion than by rigidly enforcing a rather complicated series of filing requirements.

2/ For a more detailed analysis of the development of the nonstatutory labor exemption than is necessary here, see Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881, 890-892 (7th Cir.), cert. denied, ____ U.S. ____, 103 S. Ct. 132, 74 L.Ed.2d 114 (1982). See also St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603, 604-616 (1976).

3/ For the difference between the statutory and nonstatutory labor exemptions, see Connell, supra, 421 U.S. at 621-622, 95 S. Ct. at 1834-35, 44 L.Ed.2d at 425-426; Mid-America Regional Bargaining Assoc. v. Will County Carpenters District Council, 675 F.2d 881, 884-886, 890-893 (7th Cir.), cert. denied, ____ U.S. ____, 103 S. Ct. 132, 74 L.Ed.2d 114 (1982). In Consolidated Express, Inc. v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1979), vacated on other grounds, 448 U.S. 901, 100 S. Ct. 3040, 65

L.Ed.2d 1131 (1980), the Third Circuit gave the following explanation of the nonstatutory exemption: "The term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." Id. at 513. The Third Circuit also explained that "the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. . . . [B]ut restraints . . . which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act." Id. at 514. One commentator argues persuasively that subcontracting restraints are properly classified as primary labor-market restraints, as long as such restraints are not used to fix prices or allocate product markets a la Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L.Ed. 1939, (1945). Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183 (1980).

4/ Although the nonstatutory labor exemption has been most commonly asserted by the labor unions themselves, in this case it is the employer who seeks the protection of the exemptions. When an agreement with a union forms the basis of an antitrust claim against an employer, the employer may assert the labor exemption if the exemption would have been available to the union. The reasoning of the Seventh Circuit on this point is quite persuasive:

> Although both the statutory and the nonstatutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemptions would serve little

purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment. "To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption." Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n. 14 (3d Cir. 1974). See also Amalgamated Meat Cutters & Butchers Local 576 v. Wetterau Foods, Inc., 597 F.2d 133, 136 (8th Cir. 1979); Mackey v. NFL, 543 F.2d 606, 612 (8th Cir. 1976), cert. dismissed, 434 U.S. 801, 98 S. Ct. 28, 54 L.Ed.2d 59 (1977).

Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881, 890 n. 22 (7th Cir.), cert. denied, _____ U.S. _____, 103 S. Ct. 132, 74 L.Ed.2d 114 (1982).

5/ See Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, 654 F.2d 1301 (9th Cir. 1981), aff'd in pertinent part sub nom. Woelke & Romero Framing, Inc. v. NLRB, _____ U.S. _____, 102 S. Ct. 2071, 72 L.Ed.2d 398 (1982), for a very detailed review of the legislative history and judicial development of the construction-industry proviso.

6/ Georgia Power argues that the alleged subcontracting clause should be protected by the construction-industry proviso even if no collective-bargaining relationship existed between Georgia Power and the Trades Council. This argument is based on the contention that Connell makes the construction-industry proviso applicable if a collective-bargaining relationship is found or the subcontracting agreement is restricted to a single work site. See Connell, supra 421 U.S. at 633, 95 S. Ct. at 1840, 44 L.Ed.2d at 432 (proviso "extends only to agreements in the context of collective bargaining relationships and . . . possibly

to common-situs relationships on particular jobsites as well"); see also Pacific Northwest Chapter of Associated Builders & Contractors, Inc. v. NLRB, 654 F.2d 1301, 1317-1321 (9th Cir. 1981), aff'd in part and vacated in part, Woelke & Romero Framing, Inc. v. NLRB, ____ U.S. ____, 102 S. Ct. 2071, 72 L.Ed.2d 398 (1982).

Since this Court finds that the alleged subcontracting agreement was reached in the context of a collective-bargaining relationship and was restricted to a single site, the Court makes no determination as to the validity of Georgia Power's argument that the single-site limitation is alone sufficient to invoke the construction-industry proviso.

7/ Georgia Power also contends that the prehire agreement matured or ripened into a full-fledged collective-bargaining agreement when Georgia Power hired employees through the craft unions to work at Plant Vogtle. See NLRB v. Local 103, Ironworkers, 434 U.S. 335, 98 S. Ct. 651, 54 L.Ed.2d 586 (1978); NLRB v. Haberman Construction Co., 641 F.2d 351, 357 (5th Cir. 1981) (en banc); Giordano Construction Co., 256 NLRB No. 10 (May 18, 1981), cited with approval in Woelke & Romero Framing, Inc. v. NLRB, ____ U.S. ____, ____, 102 S. Ct. 2071, 2082, 72 L.Ed.2d 398, 414 (1982). Since this Court is prepared to hold that a § 8(f) prehire agreement constitutes a collective-bargaining relationship within the meaning of Connell, it is unnecessary to decide whether the prehire agreement in question actually matured into a § 9(a) collective-bargaining agreement. Thus, the Court finds the fact that Georgia Power eventually hired employees from only 8 or 9 of the 13 signatory unions to be legally insignificant in the present circumstances.

8/ Adams also argues that the Project Agreement was not a collective-bargaining agreement nor a labor agreement of any kind because Georgia Power's chief negotiator of the Project Agreement refused to

characterize it as a collective-bargaining agreement or labor agreement. Whether parties apply legally correct labels to the agreement is irrelevant. Whether or not this Court should consider the Project Agreement to be part of a collective-bargaining context is a question of law.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8094

A.L. ADAMS CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v.

GEORGIA POWER COMPANY,

Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court
For the Southern District of Georgia

- - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion: June 4, 1984, 11 Cir., 1984, _____ F.2d _____).

Before FAY and HENDERSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise, dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an

agreement shall be to such extent unenforcible and void: Provided,

That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), provides in pertinent part:

It shall not be an unfair practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are

members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the parti-

cular geographical area.

Section 9(a) of the National Labor Relations Act, 27 U.S.C. § 159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in

effect.

Section 114-103 of the 1933 Georgia Code, now codified at Georgia Code § 34-9-11, provides in pertinent part:

> The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee . . . provided, however, that no employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits.

THE ATLANTA JOURNAL AND CONSTITUTION
February 3, 1985

"PAYING FOR PLANT VOGTLE TO BE A COSTLY MATTER FOR GEORGIA"

By Bob Deans

For more than a decade, the shadow of the Vogtle nuclear power plant has been creeping across the state's economic landscape, like darkness spreading out beneath a billowing mass of clouds. Now begins the thunder.

By the time Vogtle, which is under construction at Waynesboro, is completed, it will have cost at least $7.2 billion -- one-tenth the value of all the goods and services Georgians produce in a year. So far, Georgia Power Co.'s investors have borne the cost. But in recent months, legislators, regulators and utility officials have become ensnarled in a prickly web of issues that will determine how the utility's customers will pick up the tab.

With Vogtle scheduled to begin generating electricity in a little more than two years, the state is fast running out of time to decide how to pay for it.

"Vogtle and how it's handled is so big, it could get involved in gubernatorial politics. It's the biggest issue in Georgia," said Bobby Pafford, chairman of the Public Service Commission, which will decide how the largest part of Vogtle's cost will be passed on to consumers.

The most expensive private construction project in the state's history, Vogtle has grown bigger than life. Like an affluent but devilish uncle, Vogtle holds out two clenched hands — one harboring a 15 percent increase in generating capacity to help power the nation's fifth fastest-growing state, the other concealing electric rates that could send consumers scurrying for cover and could stymie efforts to attract new industry to the state for a long time to come.

. . .

What vexes regulators most about Plant Vogtle is how to fold its cost into rates in a way that will provide a reasonable profit for Georgia Power and its investors without creating economic chaos for

consumers.

. . .

A utility must be allowed to charge rates that will allow it to recover its operating costs and to earn a reasonable profit on the investment it has in equipment that provides service to consumers.

. . .

Cockshaw's Construction Labor News + Opinion
July, 1983, Vol. 13, No. 7

"How Open Shop Costs
Compare With Union Construction"

"It Costs 22% More Labor $$ To Build
Union Than Non-Union Confidential
5-Year Study By Major
Blue-Chip Owner Reveals"

"If owners are to survive fierce domestic and foreign competition, they must get cost-effective construction. To do this, users must choose the system which can give them these results whether it be the closed or open shop.

"The owner's customers neither know the difference between union or non-union construction nor do they care. All they are concerned about is price, the jugular vein of business. That's why future decisions on who's going to build what will be made mainly on price, not on whether an employer operates closed - open - or merit shop."

The quotes come from one of the most influential members of the widely-heralded Roundtable's "Construction Industry Cost Effectiveness

Project." If he's right, that price is now king — and we've seen little evidence that counterdicts him — the organized segment is in big trouble.

We reached this conclusion after reviewing a union versus open shop labor cost effectiveness study for the years 1978 through 1982. It was compiled by the same blue-chip owner/user that gave us similar data for the 1973-1977 period which was published in November 1978. Both studies were given to us confidentially and exclusively.

The data comes from this user's engineering-construction department which conducts on-going research as part of a program to optimize its construction labor dollar. The results are especially significant because it uses consistent accounting procedures over the years to collect and analyze the cost figures.

> The latest five-year study, involving 62 projects totaling $1.4 billion shows a continued tilt by the company toward "merit shop" built projects which now account for

60% of the company's new construction.

You don't have to be a statistical genius to see why this firm increasingly selects the open shop alternative. The company's cost figures for installing material by labor dollars is most revealing. As you can see from the breakdown on page 2, non-union tradesmen installed $1.85 worth of materials per labor dollar while the union labor dollar installs only $1.25 of materials. This means that the merit shop installs 48% more material dollars per labor dollar than the closed shop.

Cost Effectiveness Study for 62 Projects

	Open Shop	Closed Shop	% Difference*
Total Value (in 1977 dollars, $1.4 billion)	$1.0 (Billion)	$.4 (Billion)	
Results: Material $**/ Labor $**	$1.85	$1.25	48%

* [($1.85 - $1.25 = $.60) $\frac{\$ .60}{\$1.25} \times 100 - 48\%$]

** In 1977 dollars

Saved $400 million by building open shop

Expanding this to related labor costs to total

project costs, the illustration on page 3 shows union labor represents an average of 27% of total project cost while the open shop accounts for only 21%.

> The 6% difference represents more than 22% savings in labor costs and more than 6% savings in total project costs.

A comparison with current data to figures Cockshaw's CLN+O published in November of 1978 shows no startling changes. The original study involved 154 projects totaling $3.4 billion. It showed union labor accounting for 30% average of total project cost with the open shop representing 22%. This 8% difference amounted to more than 25% savings in labor costs and more than 7% savings in total project costs.

> The owner reports a tremendous impact on the company's bottom line over both five-year periods. This industrial user claims the firm saved more than $400 million by using merit shop employers in this ten-year plus period.

. . .

The dramatic shift to "merit shop" construction (see February, August, December 1982, and April 1983 issues) is the result of an owner rebellion against the high costs of doing business with the organized segment.

With construction dollars so tight, owners, like the company whose figures are cited in this month's newsletter, can no longer afford the luxury of buying a product whose labor costs are 22% steeper. Even 5-, 10-, 15-, and 20% higher labor costs are too stiff a premium to pay.

"Contractors and their unions must realize that they aren't the only ones in the battle for survival," concludes one astute user. "Many owners, faced by a declining economy and intense foreign competition, are in the same shaky economic situation. That's why dollars and not closed shop, open shop, or merit shop philosophy will dictate who builds what, where and how in the future."

OPEN SHOP CONSTRUCTION REVISITED by Herbert R. Northrup, Major Industrial Research Unit Studies No. 62, (University of Pennsylvania, The Wharton School, Industrial Reseach Unit 1984).

Table V-13
Nuclear Power Plants Built and Under Construction as of July 1981

Region	1972-1981 Union	1972-1981 Open Shop	Percent Open Shop
Northeast	33	0	0
Midwest	33	0	0
Southeast	32	23	41.8
Southwest	4	6	60.0
West	16	2	11.1
Total U.S.	118	31	20.8

Utilities are often under intense pressure by the political supporters of unions to favor unionized contractors. Moreover, because the rates charged by public utilities are controlled by state, and sometimes local governmental commissions, and because of pressures by consumer and other interest groups to keep these rates low, utility managers are extremely anxious to avoid antagonizing organized labor lest unions retaliate by opposing rate adjustments. (Footnotes omitted.)

Table XI-12
Comparison of Open Shop and Union Shop
Weighted Average Hourly Wage Rates
All and Four Crafts, All Sectors
First Quarter, 1984

Craft	Union	Open Shop	Percent Open Shop Rate of Union Rate
	$	$	%
Carpenters	15.67	10.34	55.0
Electricians	18.03	10.92	60.6
Pipefitters	17.87	12.63	70.7
Laborers	12.06	6.57	54.5
All Crafts	15.65	10.10	64.5